CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

ADDITIONAL H-1B BARRIERS OUTSIDE THE STATUTE: THE SEPTEMBER 18 EXECUTIVE ORDER ON LAYOFFS AND THE EXTENSION OF THE $100,000 PROCLAMATION

Posted on September 21, 2026 by Cyrus Mehta

On September 18, 2026, President Trump issued an executive order entitled *Enhancing Program Integrity and Interagency Coordination in the Administration of the H-1B Nonimmigrant Visa Program*. Issued alongside a proclamation extending for another year the controversial $100,000 payment requirement for certain H-1B cases, the executive order directs the Departments of Labor, Homeland Security, and State to scrutinize an H-1B employer's layoffs and contemplated layoffs throughout the H-1B process. The two measures do different work: the executive order seeks to inject a new layoff inquiry into agency decision-making, while the proclamation continues an entry restriction tied to a large payment. Both raise serious questions about statutory authority, implementation, and reach.

THE EXECUTIVE ORDER REACHES EVERY STAGE OF THE H-1B PROCESS

The order directs the Secretaries of State, Labor, and Homeland Security to take into account, in "any labor condition application, petition, visa, and entry" of an H-1B nonimmigrant, whether the sponsoring employer directly or indirectly engaged in layoffs during the previous year or plans future layoffs that negatively affect similarly situated United States workers. Its wording is strikingly broad. It does not confine the inquiry to cap-subject petitions, initial employment, or workers applying for visas abroad. By referring to any petition, the order appears to reach extensions of stay, amendments, changes of employer, and other H-1B filings adjudicated by USCIS. Its separate references to visas and entry also cover workers seeking visa issuance at a consulate or admission at a port of entry.

Section 2 establishes an interagency consultation process. When processing H-1B petitions, LCAs, and visas for workers seeking entry to perform services in a specialty occupation, the Departments of State, Labor, and Homeland Security must coordinate with the Departments of Commerce and Education and the Small Business Administration. The stated objective is to ensure compliance with the statutory requirements governing H-1B classification, LCAs, specialty occupations, and unfair immigration-related employment practices, including INA §§ 101(a)(15)(H)(i)(b), 212(n), 214(i), and 274B. Commerce, Education, and the SBA are directed to supply relevant wage, employment, academic, industrial, and other economic information. The order thus contemplates that agencies not ordinarily responsible for adjudicating H-1B petitions or LCAs will feed broader economic data into the process.

Section 3 supplies the order's operative directives. First, it instructs State, Labor, and Homeland Security, purportedly consistent with INA §§ 101(a)(15)(H)(i)(b), 212(n), 214(i), 215(a), and 274B, to take into account in any LCA, petition, visa, and H-1B entry whether the sponsoring employer directly or indirectly engaged in layoffs during the preceding year or plans future layoffs that negatively affect similarly situated U.S. workers. Second, it directs the Wage and Hour Division, within 30 days, to begin reviewing data relating to previously submitted LCAs to determine whether further action against sponsoring employers is warranted under INA § 212(n)(2)(G). Third, invoking 3 U.S.C. § 301, it delegates the President's authority under INA § 215(a) to State, Commerce, Labor, and Homeland Security to the extent necessary to implement the order, including through rules, policies, operational guidance, or other guidance.

Reciting these statutory provisions does not establish that they authorize the new inquiry. Sections 101(a)(15)(H)(i)(b) and 214(i) define the H-1B classification and specialty occupation; section 212(n) governs the LCA framework and contains Congress's targeted displacement rules; section 274B prohibits specified unfair immigration-related employment practices; and section 215(a) concerns presidential restrictions and rules governing departure and entry.

None expressly directs agencies to treat any prior or planned layoff by every H-1B employer as an adjudicative factor. The delegation to issue implementing guidance likewise cannot enlarge the substantive authority Congress granted.

That does not necessarily mean the Administration lacks every avenue to examine a layoff. INA § 274B, 8 U.S.C. § 1324b, may provide a backdoor—but only from a discrimination angle. Section 274B makes it an unfair immigration-related employment practice to discriminate in hiring, recruitment or referral for a fee, or discharge because of national origin or, in the case of a statutorily protected individual, citizenship status. The Department of Justice's Immigrant and Employee Rights Section may investigate a charge, and the Special Counsel may also initiate an investigation, when the statutory predicates are met. Thus, if an employer allegedly retained H-1B workers while discharging similarly situated U.S. citizens, permanent residents, refugees, or asylees because of citizenship status—or made discharge decisions on the basis of national origin—the government could investigate that alleged discrimination under § 274B, subject to the statute's coverage, protected-individual definition, exceptions, limitation periods, and allocation of national-origin jurisdiction with the EEOC.

But § 274B does not authorize a roving inquiry into every layoff by every H-1B employer merely because H-1B workers remained employed. A layoff is not itself unlawful under § 274B; there must be a basis to investigate whether a covered discharge involved prohibited national-origin or citizenship-status discrimination. Nor does § 274B convert the anti-discrimination inquiry into a new H-1B petition-eligibility requirement administered by DOL, USCIS, or the State Department. The executive order's invocation of § 274B may therefore enable information sharing or referrals to DOJ, but it cannot supply the missing statutory authority for those agencies to impose a program-wide layoff test.

This is an important departure from the existing statutory scheme. Congress expressly addressed layoffs and displacement in INA § 212(n)(1)(E), 8 U.S.C. § 1182(n)(1)(E), which requires an H-1B-dependent employer—or an employer found to have committed a willful failure or misrepresentation—to attest that it did not and will not displace a U.S. worker during the period beginning 90 days before and ending 90 days after the filing of the H-1B petition. Congress also addressed secondary displacement in INA § 212(n)(1)(F), 8 U.S.C. § 1182(n)(1)(F), when such an employer places an H-1B worker with another employer. And Congress carefully defined an "H-1B-dependent employer" by reference to the proportion of its workforce in H-1B status in INA § 212(n)(3)(A), 8 U.S.C. § 1182(n)(3)(A), while exempting certain highly paid or highly educated H-1B workers from these additional attestations under INA § 212(n)(3)(B), 8 U.S.C. § 1182(n)(3)(B). These provisions demonstrate that Congress was concerned about displacement by H-1B-dependent employers and willful violators, not layoffs by every H-1B employer. The executive order, by contrast, directs agencies to consider layoffs by any sponsoring employer over a one-year lookback period and even planned future layoffs. It also invokes layoffs undertaken “indirectly,” a term that is not defined. The order does not itself create an automatic bar, a new attestation, or a formal labor-market test, but it invites agencies to treat facts that Congress made dispositive only for specified employers and within carefully drawn periods as relevant across the program.

CAN THE AGENCIES IMPLEMENT A NEW LAYOFF CRITERION WITHOUT RULEMAKING?

The legality of the order will turn largely on what the agencies do next. The Immigration and Nationality Act permits an H-1B petition when the statutory and regulatory requirements are satisfied. Neither the President nor an agency may add a free-floating eligibility requirement that Congress did not enact. If USCIS were to deny an otherwise approvable extension merely because the employer had conducted unrelated layoffs, or if DOL refused to certify an LCA based on a consideration outside its statutory certification function, the agency action would be vulnerable to challenge as contrary to law and arbitrary and capricious. Any generally applicable substantive standard may also require notice-and-comment rulemaking rather than implementation through unpublished criteria, requests for evidence, or ad hoc adjudications.

The order leaves basic questions unanswered. Who is a “similarly situated” U.S. worker? Must the layoff involve the same occupation, worksite, corporate entity, or geographic labor market? What makes a layoff “indirect”? How can an employer establish that a possible future reduction will not negatively affect U.S. workers? Without objective standards, employers may receive inconsistent treatment among DOL, USCIS, consular posts, and Customs and Border Protection. The uncertainty is especially acute for extensions involving employees who have long been working in the United States and whose continued employment would not cause the employer’s earlier layoffs.

THE DIRECTIVE TO REVIEW PREVIOUSLY SUBMITTED LCAS

The order separately directs the Department of Labor's Wage and Hour Division to begin reviewing data relating to previously submitted labor condition applications to determine whether action against sponsoring employers is warranted. This retrospective review may lead to investigations concerning wages, worksite postings, benching, displacement, or the accuracy of information supplied with an LCA. Yet an LCA is largely an attestation-based filing, and DOL's authority to reject or investigate it remains bounded by statute. The directive cannot retroactively transform a lawful filing into a violation merely because the employer later reduced its workforce.

THE PROCLAMATION EXTENDS THE $100,000 PAYMENT REQUIREMENT

The accompanying proclamation, *Restriction on Entry of Certain Nonimmigrant Workers*, extends through September 21, 2027, the $100,000 payment requirement first imposed in 2025 for covered H-1B cases involving workers outside the United States. Unlike the executive order, the proclamation is framed as a restriction on entry. Its scope must therefore be assessed by reference to the text governing which petitions and workers are covered, along with any implementing guidance and judicial rulings. The proclamation should not be casually conflated with the executive order's broader direction to consider layoffs in any petition. An H-1B extension filed for a worker already in the United States may fall within the executive order's petition language even when the proclamation's entry-based payment requirement does not apply.

The proclamation touts what it describes as measurable effects of the 2025 proclamation and the subsequent DHS final rule. It states that the largest IT staffing and outsourcing firms reduced their combined H-1B registrations from 24,946 to 2,055—a 92 percent decline—and points to a nearly 97 percent decrease in consular-processing requests between the FY 2025 and FY 2027 cap seasons. Those figures may show that the measures sharply suppressed use of the program, but they do not establish that the program became more lawful or that U.S. workers benefited. A decline in filings is not, by itself, evidence that the filings displaced U.S. workers or involved fraud. Nor does a reduction in consular-processing requests distinguish between outsourcing firms and ordinary U.S. employers seeking to bring a needed professional to the United States.

The proclamation's focus on large IT outsourcing firms also obscures the breadth of the burden. The $100,000 payment does not fall only on Indian outsourcing companies. It affects every covered employer, including start-ups, hospitals, universities, research organizations, manufacturers, professional-services firms, and other businesses that may need to sponsor a worker who is abroad. The proclamation acknowledges that more than 700 employers have paid the charge. But 700 employers represent only a small fraction of the potential employer population associated with the 65,000 regular annual cap, the separate advanced-degree allocation, and the substantial universe of cap-exempt employers. The more telling question is how many employers and workers abandoned otherwise viable cases because no rational hiring decision could absorb an additional $100,000 payment.

The proclamation further invokes an Indian commerce minister's characterization of the H-1B as an "outsourcing visa." That statement was made in 2007, almost two decades before the present proclamation. It reflected a particular moment when Indian outsourcing companies were among the program's most visible users. The IT industry has since undergone paradigm shifts in cloud computing, product development, artificial intelligence, cybersecurity, remote work, and the global organization of technical talent. Whatever criticism may fairly be directed at particular outsourcing models, a 2007 quotation cannot substitute for current evidence about the diverse employers, occupations, and business models that now use the H-1B program.

Indeed, the proclamation's own evidence exposes the overbreadth of its approach. If the asserted concern is concentrated use of the cap by a discrete group of outsourcing firms, a blanket $100,000 payment imposed on covered employers across the economy is a poorly tailored response. It prices out smaller and mission-driven employers while allowing the largest and wealthiest companies to treat the payment as another cost of doing business. The resulting reduction in filings may therefore reveal less about program integrity than about the government's success in making the H-1B unavailable to employers without extraordinary resources.

More immediately, the $100,000 payment is currently blocked. On June 8, 2026, the U.S. District Court for the District of Massachusetts vacated the DHS and State Department actions implementing the 2025 proclamation in *State of California v. Mullin*, No. 1:25-cv-13829, concluding that the agencies had acted unlawfully in requiring the payment. On July 24, 2026, the United States Court of Appeals for the First Circuit denied the government's motion to stay that judgment pending appeal. USCIS has acknowledged that it will comply with the order while considering further steps. Thus, although the appeal remains pending and the government may seek additional relief, the implementing policies cannot presently be enforced.

The September 18 proclamation extends the duration of the same $100,000 payment requirement; it does not eliminate the legal defects identified by the Massachusetts court. The existing vacatur is directed at the agency actions implementing that payment requirement and should therefore prevent DHS and the State Department from collecting the payment under the extension as well, unless the judgment is stayed, reversed, or the agencies adopt materially different lawful implementing action. The President cannot evade an operative judicial order simply by extending or reissuing the underlying proclamation. Accordingly, the new proclamation may purport to continue the fee through September 21, 2027, but the fee should remain unenforceable while the nationwide vacatur remains in effect.

The extension does not resolve the fundamental question whether the President may condition the filing or approval of an H-1B petition on a payment of this magnitude. The proclamation relies on presidential entry authority, but Congress established the H-1B petition process and prescribed the fees that accompany it. A measure that effectively rewrites those statutory conditions may exceed an entry restriction and intrude upon Congress's immigration scheme. Litigation over the original proclamation and its implementation will therefore remain highly relevant to the extended measure.

WHAT H-1B EMPLOYERS SHOULD EXPECT

Until the agencies publish implementing rules or guidance, employers should expect questions about workforce reductions at the LCA, petition, visa, and admission stages. Employers filing extensions as well as new petitions should be prepared to explain the occupations, locations, timing, and business reasons associated with recent layoffs and to distinguish affected positions from the sponsored H-1B role. They should also preserve records showing compliance with existing wage, notice, and nondisplacement obligations. At the same time, employers should not assume that any layoff makes an H-1B filing unlawful; the executive order says that layoffs are to be considered, but it does not announce a categorical prohibition.

CONCLUSION

The September 18 order attempts to turn layoffs into a program-wide H-1B adjudication factor, reaching not only workers who will enter the United States but also, on its face, petitions filed for workers already here. The proclamation operates differently by extending an entry-related payment requirement for another year. Neither measure supplies the standards needed for predictable adjudication, and neither gives the agencies license to disregard the limitations Congress placed on their authority. The decisive questions will arise in implementation: whether the agencies adopt lawful, transparent standards or use the directives to impose new eligibility rules through enforcement and case-by-case adjudication.